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No. 86-1164

In the Supreme Court of the United States

October Term, 1986

RUTH RAYNER and REVEREND JESSE L. DAVIS,

Petitioners,

v.

SHIRLEY CLENDENING,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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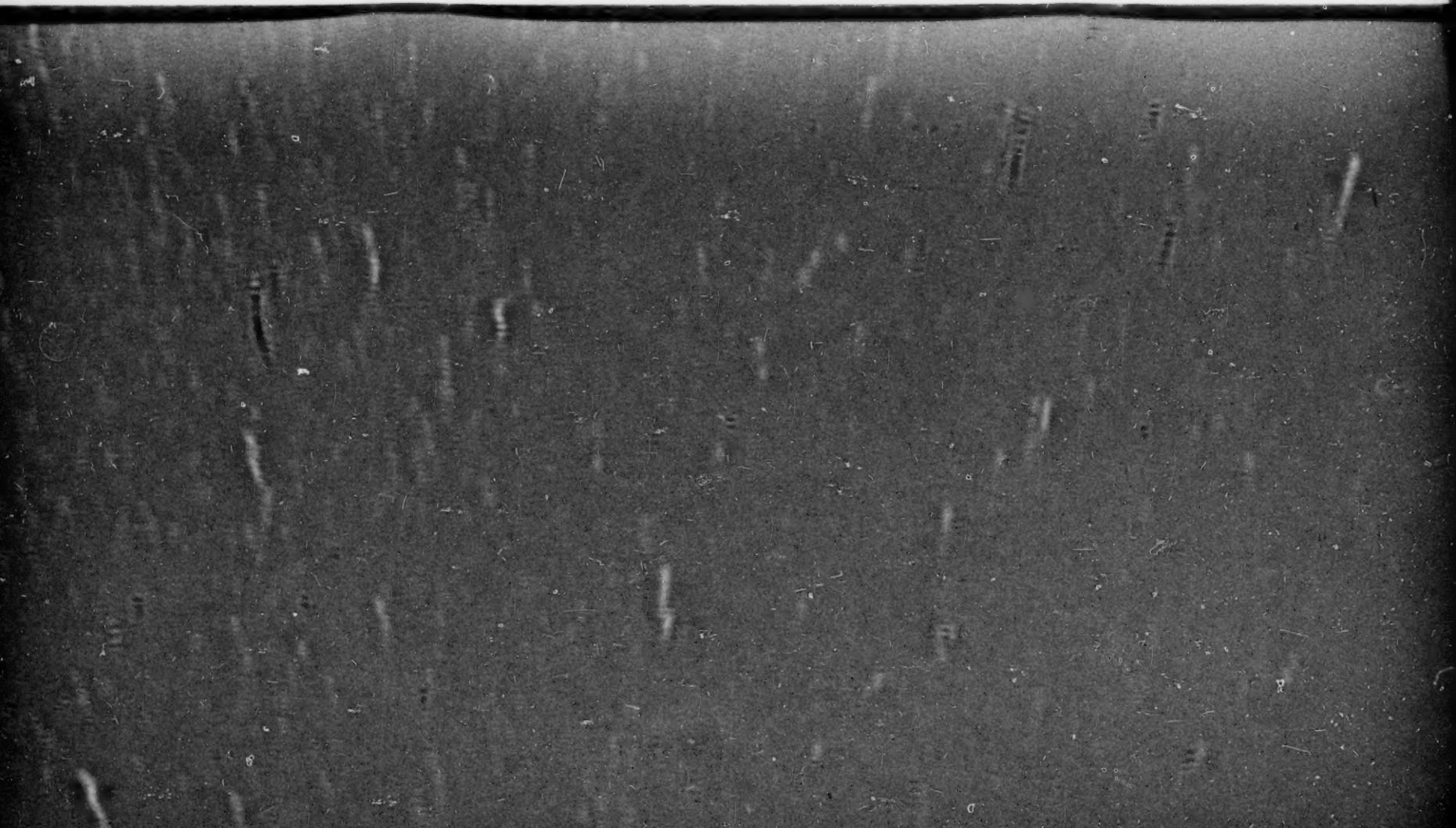

QUESTIONS PRESENTED

I. Should this Court exercise its power to consider questions raised for the first time in a petition for writ of certiorari or questions not implicated by the decisions of the courts below?

II. Is a district court's award of sanctions as provided by Rule 11 infirm simply because the opinion did not expressly recite the role which deterrence played in the specific sanction levied?

III. A. Do Fed. R. App. P. 38 and 28 U.S.C. § 1927 require a finding of bad faith prior to the imposition of sanctions under those provisions?

B. If bad faith were required, would an award of sanctions be improper merely because bad faith is not explicitly, but was implicitly, found?

IV. Are a litigant and his attorney—who failed to respond to motions for sanctions before the district and appellate courts, failed to request a hearing on the subject of sanctions, and failed to raise a disputed fact issue—denied due process by the imposition of sanctions following notice and an opportunity to respond as well as a remand to the district court for a determination of the amount of attorneys' fees on appeal and an apportionment of the sanction between them?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' statement of the case does not present sufficient details of the proceedings in the courts below for the Court to consider the questions presented.

In 1976, petitioner Jesse Davis, represented by petitioner Ruth Rayner, commenced a personal injury action in a Texas state court against Orkin Exterminating Com-

pany. After the jury returned a verdict in Orkin's favor in a second trial, Davis noticed an appeal and, through Rayner, requested that certain transcripts be prepared by respondent, Clendening, the official court reporter for the state trial court.

During the state appeal, Davis and Orkin reached a settlement, executed general releases, and jointly moved to dismiss the appeal. Following the dismissal, Clendening moved in the trial court for payment from Davis' appeal bond of her fees for preparation of the transcripts. Rayner (who indemnified the bonding company personally) and Davis opposed payment of those fees, complaining of the form, content, and timeliness of the transcripts. After a hearing before a second state district judge, the judge ordered that Clendening's fees, with minor adjustments, be paid to her from the appeal bond.

Davis appealed that order through the state judicial system. His appeal was dismissed both at the intermediate appellate and supreme court levels for lack of timely prosecution. At the same time Davis began his appeal of the state court order, he initiated an action pursuant to 42 U.S.C. § 1983 against Clendening in the United States District Court, alleging that the claimed derelictions of her duties as a state court reporter deprived Davis of due process in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Davis filed the § 1983 action after an unsuccessful offer to drop pursuit of the threatened federal action in exchange for "an amount equal to the [state court] Judgment of $3,231.50 and all costs related thereto and this appeal." In support of his claim that he was deprived of life, liberty, and property, Davis alleged claims of hu-

miliation, impairment of reputation, and aggravation of his "marital relationship beyond repair" as a result of Clendening's alleged derelictions.

Clendening moved in the § 1983 suit for summary judgment and for sanctions. On the merits, Davis offered an affidavit of Rayner identifying certain documents related to the state court litigation, and an unsigned affidavit purporting to be that of another court reporter. Davis offered no evidence in opposition to Clendening's motion for sanctions of attorneys' fees pursuant to Fed. R. Civ. P. 11 and 42 U.S.C. § 1988.[1] Petitioners challenged neither the standards for imposition of sanctions under Rule 11 nor the affidavit setting forth the amount of fees sought, and did not request a hearing on the sanctions question. The district court granted summary judgment in Clendening's favor on grounds of *res judicata* and Clendening's qualified immunity, and awarded Clendening her costs and attorneys' fees against Davis and Rayner.

Davis and Rayner, with Rayner acting as both appellant and attorney for herself and Davis, appealed to the court of appeals below. Clendening moved for the imposition of sanctions on appeal, to which neither Davis nor Rayner responded. The court of appeals affirmed the district court on the ground of qualified immunity, and declined to address the *res judicata* issue. The court of

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1. Although Davis, in his formal response to the motion for summary judgment, stated that plaintiffs' claims were "with foundation," "well grounded," "warranted by existing law," and "not interposed to harass," these assertions were not raised by affidavit, are wholly conclusory, and are not supported by any summary judgment evidence.

appeals also affirmed the district court's imposition of sanctions, finding that Davis knew or should have known that he could not overcome Clendening's qualified immunity without offering some evidence of bad faith or a violation of clearly settled law, and finding further that Davis pursued the action frivolously. Finally, the court of appeals awarded Clendening her costs and attorneys' fees on appeal, finding that Davis and Rayner disregarded the warning sent by the district court, pursued an appeal "no more reasonable than the underlying action . . ." previously found frivolous, and multiplied groundless proceedings. The court of appeals remanded the case to the district court for determination of the amount of attorneys' fees and costs, and for apportionment of them between Davis and Rayner.

Davis and Rayner petitioned for rehearing but did not raise in the petition any issue as to the propriety, amounts, or procedure involved in the district court's or court of appeals' award of attorneys' fees against Davis and Rayner. The petition for rehearing was denied.

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REASONS FOR DENYING THE WRIT

I. Summary Of The Argument.

This case does not present for review any of the hard questions which courts have faced or will likely face under Rule 11 or any federal statutory provisions for sanctioning litigants or attorneys. The arguments raised in the petition for certiorari were neither presented to the courts below nor passed upon by them. The issues raised by

petitioners as to the adequacy of the evidence supporting respondent's entitlement to and the amount of her attorneys' fees is a factual matter which petitioners wholly failed to address when the fact-finders below considered respondent's motions for sanctions and attorneys' fees at the trial and appellate court levels. Having failed to raise a disputed issue then, it is inappropriate for petitioners to claim the necessity for a hearing now, and entirely proper for the courts below to have awarded fees without a hearing. Petitioners' arguments that the courts below failed to apply the correct standards in awarding fees against them are incorrect as a matter of fact and law, were not presented to the deciding courts, and are not squarely implicated by the decisions of either the district court or the court of appeals.

An award of sanctions under Rule 11 does not require a specific articulation of the role of the deterrence function of the Rule, as opposed to its other functions of compensation and penalization. Moreover, the award of sanctions by the district court was correct in all respects.

The court of appeals' sanctions pursuant to Rule 38 and § 1927 were also appropriate. Both Rayner and Davis were subject to Rule 38, which, as all circuits have recognized, requires no finding of bad faith. Hence, the appropriate standard under § 1927 is not necessary to the decision below. Even under § 1927, however, the award of sanctions was appropriate, as those courts requiring bad faith do not give adequate consideration to the history and language of that section, which demonstrate that no bad faith is required. Even were bad faith a requirement under § 1927, the court of appeals implicitly found such bad faith in its opinion below.

Petitioners were afforded due process both at the district and appellate levels. They were given notice of respondent's motions for sanctions, but chose to disregard those notices. They did not raise a fact issue regarding sanctions. The court of appeals remanded the case for a determination, in which petitioners will have full opportunity to participate, of the amount of appellate attorneys' fees and an apportionment of liability between Rayner and Davis.

II. None Of Petitioners' Contentions Were Preserved For Review By The Court.

Petitioners failed to present to the courts below the arguments they now raise in their Petition. See discussion at p. 3 and n.1.

While the failure to raise an issue below does not jurisdictionally preclude this Court from its consideration, *Vance v. Terrazas,* 444 U.S. 252 (1980), the Court's normal practice is to decline review of questions presented for the first time in a petition for a writ of certiorari. *Equal Employment Opportunity Commission v. Federal Labor Relations Authority,* 476 U.S. —, 106 S.Ct. 1678 (1986) (dismissing writ of certiorari as improvidently granted); *Federal Trade Commission v. Grolier, Inc.,* 462 U.S. 19, 23 n.6 (1983); *Delta Airlines v. August,* 450 U.S. 346, 362 (1981) (issue presented in petition but not to court of appeals not properly before Supreme Court); *Youakim v. Miller,* 425 U.S. 231, 234 (1976) (deviating from general rule only in "exceptional cases"). This case presents none of the exceptional circumstances that would suggest deviation from the Court's normal practice, and the Court should decline to consider the issues not raised below.

III. The Award Of Attorneys' Fees At The District Court Level.

The courts below correctly decided the questions of respondent's entitlement to and the amount of her reasonable attorneys' fees in defending against the groundless § 1983 action in the district court. Reimbursement of the expenses occasioned by conduct in violation of Rule 11, including a reasonable attorneys' fee, is the one sanction expressly provided for in the Rule. In practice, it is that sanction to which courts most often resort. Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions,* 100 HARV. L. REV. 630, 634-35 n.19 (1987) (citing S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS 40 (Federal Judicial Center 1985)). While deterrence is obviously one function of the imposition of Rule 11 sanctions, it is not the only one. Two others noted by KASSIN, *supra,* at 29, are penalizing the offender and compensating the offended party. An award of costs and fees to the victim is entirely consistent with the latter rationale. *See also,* Schwarzer, *Sanctions Under the New Federal Rule 11,* 104 F.R.D. 181, 201 (1985) (Rule 11 serves dual purposes of compensation and penalization). As noted by Judge Schwarzer, "The most direct consequence [of a Rule 11 violation] is reflected in the attorney's fees and other expenses inflicted on the other side. . . ." 104 F.R.D. at 200.

Petitioners' notion that an award of attorneys' fees under Rule 11 must expressly reflect the interplay between the deterrence function of the Rule and the specific award ordered is indeed a novel one. Understandably, petitioners do not advance with the same zeal any contention that such

an award must explicitly allude to the compensation function of the Rule. Here, the district judge was obviously cognizant of the multiple functions of Rule 11 when he noted that the Rule "authorizes imposition of an 'appropriate sanction,' including an award of attorney's fees, for violation of its provisions." The district judge, the person closest to the relevant facts through participation in the litigation, determined that the appropriate sanction here was imposition of joint and several liability against Davis and Rayner for the attorneys' fees incurred by Clendening. He explained the preferred sanction briefly, but clearly: " . . . Clendening is entitled to recover the attorney's fees she expended in defending this case." Petitioners did not challenge the district judge's reasoning in the court of appeals, which, employing the abuse of discretion standard of review, affirmed the lower court.

Petitioners acknowledge that the initial consideration in a sanction award is "the cost of the Rule 11 violation to the party seeking sanctions. . . ." (Petition, p. 8). Respondent supplied evidence of this cost to the district court. Petitioners offered no evidence in response. Hence, this case simply does not raise the issue of the appropriate weight to be given the deterrent function of Rule 11.

The district court was also correct in arriving at the amount of Clendening's reasonable attorneys' fees, using the "lodestar" method. *Hensley v. Eckerhart,* 461 U.S. 424 (1983). Respondent submitted evidence supporting the services performed, the hours expended, and the rate claimed. Although petitioners submitted no evidence on the question, the district court did adjust the amount of fees requested. Petitioners did not challenge the sufficiency of the evidence on attorneys' fees in Davis' motion

for new trial, in their appeal, or in their petition for rehearing in the court of appeals. Thus, petitioners failed at every stage of this proceeding to raise a single disputed fact issue as to the amount of Clendening's attorneys' fees.

The district court acted correctly in setting Clendening's fee, as did the court of appeals in affirming that determination.

IV. The Award Of Attorneys' Fees At The Appellate Level.

Based upon a finding that Davis and Rayner multiplied the groundless proceedings by their appeal, the court of appeals awarded further sanctions against both in the form of costs and attorneys' fees and remanded the case to the district court for a determination of the amount and for an apportionment of liability between the two. The court of appeals cited as authority for its award both Federal Rule of Appellate Procedure 38 and 28 U.S.C. § 1927, and petitioners now challenge the standards under which fees may be awarded pursuant to those provisions. This case, however, does not present the important questions petitioners suggest. Petitioners' arguments are raised for the first time in their petition for writ of certiorari. Further, the standard for sanctions under § 1927 is not necessarily before this Court, and under either Rule 38 or § 1927, the court of appeals correctly assessed attorneys' fees against petitioners.

A. Appellate Rule 38

Rule 38 provides that "If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee." The Ad-

visory Committee Notes unequivocally state, and petitioners concede, that an assessment of attorneys' fees falls within the ambit of "just damages" provided for in Rule 38. (Petition, p. 13). Petitioners' contention with regard to imposition of fees under that rule is that, prior to any such imposition, the court of appeals must expressly find bad faith by the rule's offenders.[2]

A finding of petitioners' bad faith is implied throughout the opinion of the court of appeals. The court stressed that Davis knew or should have known that his claims against Clendening were infirm in the absence of some evidence tending to undermine Clendening's qualified immunity. It also found that Davis and Rayner multiplied the groundless proceedings by frivolously appealing a claim summarily terminated by the district court and sanctioned as frivolous under Rule 11. At least one other court has found that a groundless appeal of an action found frivolous and sanctioned below is all but tantamount to an intentional abuse of process. *United States v. Nesglo, Inc.*, 744 F.2d 887, 892 (1st Cir. 1984) (counsel's "frivolous appeal of a sanction for bringing frivolous litigation borders on abuse of process"); *see also, Bartel Dental Books Co., Inc. v. Schultz*, 786 F.2d 486, 491 (2nd Cir.), *cert. denied*, 106 S.Ct. 3298 (1986) (awarding sanctions under Rule 38 where counsel raised same claims on appeal that district court previously sanctioned as frivolous or baseless); Annotation,

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2. This contention was not raised in the court of appeals. Petitioners filed no response at all to Clendening's motion for sanctions in the court of appeals, nor did their brief or petition for rehearing to the court of appeals advance any argument as to the appropriate standard for sanctions on appeal. For the reasons stated in Part II, this issue is therefore not appropriate for review by this Court.

Sanctions for Frivolous Appeals, 67 A.L.R. Fed. 319, 323-24 (1984) ("In the majority of cases, however, a court's determination of frivolity seems in itself to imply the existence of improper motive or bad faith and, hence, predetermines some award of costs or fees under Rule 38. . . . [I]t is a rare instance where a court will conclude that an appeal is frivolous but refrain from assessing costs or damages.") Thus, unlike the situation where sanctions are imposed for the first time on appeal, intentional behavior is implicit in the court's finding that petitioners here frivolously raised on appeal the same frivolous claims condemned by the district court.

Petitioners' arguments for imputing a bad faith requirement to Rule 38 are severely undermined by the purpose of the rule itself, by analogy to Fed. R. Civ. P. 11, and by the cases applying Rule 38. The Advisory Committee Notes to the rule explain that damages are awarded for a frivolous appeal "as a matter of justice to the appellee and as a penalty against the appellant." The first purpose of Rule 38 is to compensate prevailing parties in district courts for the expense and delay of defending against meritless appeals. *Ruderer v. Fines,* 614 F.2d 1128, 1132 (7th Cir. 1980). The finding of frivolousness strikes a balance between these considerations; an additional bad faith requirement would disserve the first goal of the rule.

By analogy to Fed. R. Civ. P. 11, permitting sanctions for the filing of a factually groundless and legally unwarranted pleading, the lower federal courts require no finding of bad faith prior to an award of sanctions under that rule.[3] Petitioners offer no argument as to why the stan-

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3. Petitioners do not suggest that a finding of bad faith is required under Rule 11.

dard at the appellate level should be any more solicitous of the offending party, and indeed it should not be. In the case of a frivolous appeal of a claim found frivolous by the district court, it would be particularly anomalous if a party, who had already been sanctioned by the district court, were insulated from sanctions on appeal by a more stringent, subjective bad faith requirement. Such an added requirement would remove the very disincentive to appeal a frivolous claim which Rule 11 interposes to its initial filing, and would instead all but insure the appeal of every Rule 11 sanction, since no bad faith is required for the latter.[4]

Nor do the courts of appeal support petitioners' argument for the implication of a bad faith requirement for the imposition of sanctions under Rule 38. No court of appeals has consistently required more than a finding of frivolousness to levy sanctions under Rule 38.[5] The stan-

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4. The move from a subjective bad faith standard to the objective standard now embodied in the 1983 amendments to Rule 11 was necessitated by the inefficacy of the former rule to curb abuses in the federal courts. American Bar Association Section Of Litigation, *Sanctions: Rule 11 And Other Powers* 4 (American Bar Association 1986). Despite this recognized deficiency, petitioners urge the Court to adopt a subjective standard for the filing of frivolous appeals.

5. All of the cases cited by petitioners in support of their argument for a bad faith test under Rule 38 are from the Seventh Circuit. That circuit has now rejected any subjective bad faith test under Rule 38. See text at p. 14. Although one Second Circuit case has held that bad faith is a prerequisite to Rule 38 sanctions, *State of West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079 (2nd Cir.), *cert.*

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dard generally applied is that employed by the First and Ninth Circuits in *Johnson v. Allyn & Bacon, Inc.*, 731 F.2d 64, 74 (1st Cir.), *cert. denied*, 469 U.S. 1018 (1984) (fees on appeal may be awarded if appeal is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith"); and *Taylor v. Sentry Life Ins. Co.*, 729 F.2d 652, 656 (9th Cir. 1984) (appeal is frivolous under Rule 38 "when the result is obvious . . . or appellant's arguments are wholly without merit").[6] The Seventh Circuit,

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denied, 404 U.S. 871 (1971), the court there was jointly considering the standard under 28 U.S.C. § 1912, 28 U.S.C. § 1927, and Rule 38. In other Second Circuit cases since *Pfizer*, the court, considering only Rule 38, has awarded fees against both litigants and attorneys without a finding of bad faith. *Bartel Dental Books Co., Inc. v. Schultz*, 786 F.2d 486 (2nd Cir.), *cert. denied*, 106 S.Ct. 3298 (1986); *Paulson v. United States*, 758 F.2d 61 (2nd Cir. 1985); *Teledyne Industries, Inc. v. Podell*, 546 F.2d 495 (2nd Cir. 1976).

6. Every circuit now imposes sanctions under Rule 38 without a finding of subjective bad faith.

First Circuit: *Johnson v. Allyn & Bacon, Inc.*, cited in text.

Second Circuit: See note 5, *supra*.

Third Circuit: *Sun Ship, Inc. v. Matson Navigation, Inc.*, 785 F.2d 59, 64 (3rd Cir. 1986). ("Rule 38 focuses on the merits of the appeal regardless of good or bad faith").

Fourth Circuit: *Sparrow v. Commissioner of Internal Revenue*, 748 F.2d 914 (4th Cir. 1984).

Fifth Circuit: *Olympia Co., Inc. v. Celotex Corp.*, 771 F.2d 888 (5th Cir. 1985).

Sixth Circuit: *Perkins v. Commissioner of Internal Revenue*, 746 F.2d 1187 (6th Cir. 1984).

Seventh Circuit: See *Bacon* and *Coleman* cases, discussed in text.

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which requires a finding of frivolousness as well as a determination that sanctions are appropriate, has recently rejected any subjective bad faith standard. In *Bacon v. American Federation of State, County and Municipal Employees Council #13*, 795 F.2d 33, 35 (7th Cir. 1986) the court, even under the more indulgent standard applied to a *pro se* litigant, imposed sanctions *sua sponte*, and held that

> [i]t is no defense [to the imposition of sanctions under Rule 38] that the pro se litigant may not have thought his cause hopeless; we cannot peer into a litigant's mind; it is enough that a reasonable person in his position would have known that he had no basis for challenging the district court's decision.

Accord, Coleman v. Commissioner of Internal Revenue, 791 F.2d 68, 71 (7th Cir. 1986) (Seventh Circuit standard for imposition of sanctions under Rule 38, Fed. R. Civ. P. 11, and 28 U.S.C. § 1927 is purely an objective one, and court should impose sanctions when a "person should have known that his position is groundless"). Thus, no court of appeals presently imposes the requirement that peti-

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Eighth Circuit: *Standridge Flying Service v. Department of Transportation*, 712 F.2d 1223 (8th Cir. 1983).

Ninth Circuit: See *Taylor v. Sentry Life Ins. Co.*, cited in text.

Tenth Circuit: *Charczuk v. Commissioner of Internal Revenue*, 771 F.2d 471 (10th Cir. 1985).

Eleventh Circuit: *Allstate Insurance Co. v. International Shipping Corp.*, 703 F.2d 497 (11th Cir. 1983).

District of Columbia Circuit: *Furbee v. Vantage Press, Inc.*, 464 F.2d 835 (D.C. Cir. 1972).

Federal Circuit: *United States v. Atkinson*, 748 F.2d 659 (Fed. Cir. 1984).

tioners urge the Court to adopt, and petitioners advance no arguments as to why such a bad faith standard under Rule 38 should be implied. In short, this case presents no occasion for review of the standard under Rule 38 by this Court.

B. 28 U.S.C. § 1927

The court below cited, in addition to Rule 38, 28 U.S.C. § 1927 as a basis for its award of sanctions against petitioners for pursuing a frivolous appeal.[7] Petitioners, citing a split of authority among the circuits, contend that a finding of bad faith is required prior to an award under that section, and argue that review by this Court is needed to resolve the conflict. Review of this case, however, is unwarranted for several reasons.

First, this case does not squarely present for review the issue of the appropriate standard under § 1927, because the court of appeals below awarded sanctions against both Davis and Rayner under Rule 38, which requires no finding of bad faith. On appeal to the court below, petitioner Rayner occupied the status of appellant herself as well as of attorney to appellant Davis. Thus she was subject to the strictures of Rule 38 to the same extent that

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7. 28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses and attorneys' fees reasonably incurred because of such conduct.

Davis was.[8] The court of appeals' award of attorneys' fees on appeal stands sufficiently under the authority of Rule 38 without any reliance on § 1927 or the standard for applying it.

Second, petitioners failed to raise the issue of the appropriate standard for sanctions under § 1927 before the court of appeals. Petitioners did not even respond to respondent's motion for sanctions to that court, and did not raise the point in their petition for rehearing. For the reasons discussed previously, the Court should deny review of that issue now. See Part II at 6.

Third, a finding of bad faith is implicit in the opinion of the court of appeals. See discussion at pp. 10-11, *supra*. Even the court of appeals for the Third Circuit, which reads a bad faith requirement in § 1927, does not require such a finding to be made expressly in the court's opinion. *Baker Industries v. Cerebus Ltd.*, 764 F.2d 204, 209 (3rd Cir. 1985) (affirming award under § 1927 despite absence of express finding of bad faith where bad faith was evident from record as a whole).

Finally, even in the absence of a finding of bad faith, sanctions against Rayner under § 1927 are appropriate.

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8. Even were Rayner not a litigant herself before the Fifth Circuit, she would be subject to Rule 38, as that Rule has been construed to reach not only an appellant, but his attorney as well. *Bartel Dental Books, supra*, 786 F.2d at 491; *Des Vignes v. Dept. of Transportation, Federal Aviation Administration*, 791 F.2d 142 (Fed. Cir. 1986), *cert. denied*, 107 S.Ct. 185 (1986); *International Union of Bricklayers & Allied Craftsmen Local Union No. 20, AFL-CIO v. Martin Jaska, Inc.*, 752 F.2d 1401, 1407 n.8 (9th Cir. 1985) (Rule 38 coupled with inherent power of the court).

While some circuits have created a bad faith requirement as a prerequisite to sanctions under § 1927, that requirement is not justified.[9] Section 1927 permits an award of

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9. Petitioners' characterization of the "split" among circuits on this point (Petition, p. 11) is inaccurate. Petitioners failed to note that the District of Columbia Circuit has rejected a bad faith requirement under § 1927. *Reliance Ins. Co. v. Sweeney Corp, Maryland,* 792 F.2d 1137 (D.C. Cir. 1986).

   Contrary to petitioners' assertion that the Second, Third, Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits "will only impose sanctions when there is clear evidence of 'bad faith,'" (Petition, p. 11), in fact only the Second, Third, and Ninth Circuits require bad faith under § 1927.

   In *Blair v. Shenandoah Women's Center, Inc.,* 757 F.2d 1435 (4th Cir. 1985), cited by petitioners, the Fourth Circuit upheld the district court's finding of bad faith, but did not hold that any such finding was required prior to imposing sanctions under § 1927.

   In *Knorr Brake Corp. v. Harbil, Inc.,* 738 F.2d 223, 227 (7th Cir. 1984), also cited by petitioners, the Seventh Circuit expressly disavowed any subjective bad faith requirement. "This court has not required an express finding by the district court of subjective bad faith or intent to delay to support an award of fees under section 1927." Rather, "some degree of culpability on the part of counsel is required." *Id.* The court went on to note that such culpability may be inferred "from a total lack of factual or legal basis for a suit." *Id.*

   In *Jaquette v. Black Hawk County,* 710 F.2d 455 (8th Cir. 1983), the Eighth Circuit did not enunciate any standard under § 1927; the court's reference to bad faith was in connection with a court's *inherent* power to impose sanctions. *Cf. Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766 (1980). In *Hughes v. Hoffman,* 750 F.2d 53 (8th Cir. 1984), the Eighth Circuit imposed sanctions against counsel pursuant to § 1927, 28 U.S.C. § 1912, and FRAP 38 without a finding of bad faith.

   The case attributed by petitioners to the Eleventh Circuit, *Estate of Blas v. Winkler,* 792 F.2d 858 (9th Cir. 1986), is in fact a Ninth Circuit case.

attorneys' fees against an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously. . . ." As this Court has held, "the term 'vexatious' *in no way implies* that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him." *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421 (1978) (emphasis added). This reasoning has been recognized by courts of appeal considering § 1927. *Charczuck v. Commissioner of Internal Revenue*, 771 F.2d 471, 476 (10th Cir. 1985); *McCandless v. Great Atlantic and Pacific Tea Co., Inc.*, 697 F.2d 198, 200-201 (7th Cir. 1983).

This Court's decision in *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), and the history of § 1927, further preclude any implication of a bad faith requirement. In *Roadway Express*, the Court, applying a previous version of § 1927 that did not expressly allow for the assessment of attorneys' fees but only for assessment of "costs," recognized that courts have "inherent power," apart from any statute, to assess attorneys' fees against counsel who acted in bad faith. 447 U.S. at 766. The trial court had not made specific findings of bad faith necessary to support an award under this inherent power. The Court nevertheless affirmed liability for costs under § 1927, despite the absence of a finding of bad faith, but denied attorneys' fees because "costs" under that section did not include them.

Following the decision in *Roadway Express*, Congress amended § 1927 expressly to allow for the assessment of attorneys' fees. 28 U.S.C. § 1927 (1982) (as amended by Pub. L. No. 96-349, § 3, 94 Stat. 1156 (1980)). Were bad

faith a prerequisite to an award of attorneys' fees under § 1927, then Congress' amendment of that statute would be rendered superfluous, because the Court had previously recognized the inherent power to sanction bad faith conduct with an award of attorneys' fees. This was recognized in *Jones v. Continental Corp.*, 789 F.2d 1225 (6th Cir. 1986):

> To hold that subjective "bad faith" remains as necessary under amended § 1927 as under *Roadway Express* would be to assume that the amendment added nothing to the "inherent powers" recognized in that case. Since we must assume that Congress intended the post-*Roadway Express* change in § 1927 to have effect, we hold that 28 U.S.C. § 1927 authorizes a court to assess fees against an attorney for "unreasonable and vexatious" multiplication of litigation despite the absence of any conscious impropriety.

789 F.2d 1225, 1230. *Cf. McCandless, supra*, 697 F.2d 198, 201 n.4 (acknowledging same reasoning without deciding issue).

Section 1927 does not by its terms require bad faith for the imposition of attorneys' fees. The history of § 1927 forecloses petitioners' argument that such a requirement may be implied. In any event, construction of the statute by this Court is not appropriate because petitioners did not raise the question below and the decision below stands sufficiently under the authority of Appellate Rule 38.

V. The Procedure Employed By The Courts Below To Afford Petitioners Due Process.

The district court awarded sanctions against petitioners following respondent's motion for summary judg-

ment and for sanctions. That motion and the supporting memorandum expressly refer to Fed. R. Civ. P. 11 and argue for the propriety of sanctions thereunder. An affidavit of respondent's attorney describing the services rendered, total hours, and reasonable fees expended accompanied the motion for sanctions. Petitioners did not raise any fact issue in response, but only stated as conclusory "issues of law" that Davis' claims were "with foundation," "well grounded," and "warranted by existing law," largely parroting the language of Rule 11. Petitioners did not request a hearing and did not raise the hearing issue in their motion for a new trial, their appeal to the court of appeals, or their petition for rehearing to that court.

The court of appeals awarded sanctions against Davis and Rayner upon respondent's motion for sanctions. Again, respondent briefed the appellate sanctions issue and offered the affidavit of her attorney in support of the attorneys' fees sought. Petitioners failed to reply to the motion, filed no reply brief, and did not otherwise address the appellate sanctions issue before decision or in their petition for rehearing. Nevertheless, the court below remanded the case to the district court for a determination of the amount of respondent's appellate attorneys' fees and for an apportionment of liability for those fees between Rayner and Davis.

Contrary to petitioners' assertion, this case raises no due process issues whatsoever. While there is no question that due process must be afforded prior to the imposition of sanctions, it is equally apparent that due process was afforded here.

The courts, commentators, and the relevant rules and statutes themselves suggest that due process does not require a hearing prior to the imposition of sanctions. In *United States v. Nesglo, Inc.*, 744 F.2d 887 (1st Cir. 1984), the court of appeals held that the district court did not deny an attorney due process where the attorney "had adequate notice of appellees' motion [for fees under § 1927] and the deadline for responsive papers but chose to disregard them." 744 F.2d at 890. The court added that a hearing prior to an award of fees is not uniformly required, especially when the court awarding fees was sufficinetly familiar with the parties and the litigation. *Id.* In any event, due process under Fed. R. Civ. P. 11 does not always require an evidentiary hearing; rather, the notice and opportunity requirement may be satisfied by the fact that the district judge has full knowledge of all relevant facts through participation in the proceedings. *Oliveri v. Thompson*, 803 F.2d 1265, 1280 (2nd Cir. 1986). Even in *Eash v. Riggins Trucking Inc.*, 757 F.2d 557 (3rd Cir. 1985), cited by petitioners (Petition, p. 17), the Third Circuit recognized that a hearing is not always required. 757 F.2d at 571. *See also, Rodgers v. Lincoln Towing Service, Inc.*, 771 F.2d 194 (7th Cir. 1985) (hearing not required under Rule 11 where claims were objectively frivolous).

The Advisory Committee Notes to Fed. R. Civ. P. 11 explicitly recognize the need for due process, yet evidence a strong presumption against excessive procedural undertakings.

> In many situations the judge's participation in the proceedings provides him with full knowledge of the relevant facts and little further inquiry will be necessary.

> To assure that the efficiencies achieved through more effective operation of the pleading regimen will not be offset by the cost of satellite litigation over the imposition of sanctions, the court must to the extent possible limit the scope of sanction proceedings to the record.

See also, Schwarzer, *Sanctions Under the New Federal Rule 11,* 104 F.R.D. 181, 198 (1985) ("[b]ecause ordinarily the opposition [to the imposition of sanctions under Rule 11] will consist of an explanation and justification, it can be adequately presented by memorandum and declarations").

The history of 28 U.S.C. § 1927 suggests that Congress, while cognizant of due process requirements, did not believe that a hearing was necessary for imposition of attorneys' fees under that section. When § 1927 was amended in 1980, the proposed Senate version included an express requirement that "costs, expenses, and attorneys' fees shall be imposed under this section upon motion of any party only after a hearing, held after trial."[10] This hearing requirement was rejected in the final version of amended § 1927, though the need for due process was nevertheless recognized. See 126 CONG. REC. 23625-26. Implicit in Congress' action is the conclusion that due process under § 1927 does not require a hearing.

Petitioners' citation to *Miranda v. Southern Pacific Trans. Co.,* 710 F.2d 516 (9th Cir. 1983) is misleading in the context of the present case. There the Ninth Circuit, in a sanctions case under a local court rule, afforded the

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10. *Antitrust Procedural Improvement Act of 1979: Hearings on S.390 before the Subcomm. on Antitrust & Monopoly of the Senate Comm. on the Judiciary,* 96th Cong., 1st Sess. 138 (1979).

procedure provided by Fed. R. App. P. 46(c) for disciplining counsel. That rule, however, only contemplates "reasonable notice and an opportunity to show cause to the contrary, and after hearing, *if requested*. . . ." (emphasis added). Here, petitioners received notice that sanctions were being sought at both the district and appellate levels. They did not avail themselves of the opportunity to respond, they did not request a hearing, and they did not raise a fact issue suggesting the need for a hearing.

Petitioner Rayner contends that she had no opportunity to defend herself "once the decision was made that sanctions were seriously contemplated." (Petition, p. 16). In fact, Rayner had both notice and an opportunity to respond to Clendening's motions for sanctions at both the district and appellate levels, but chose to ignore those opportunities. Her contention that she was entitled to an update from the court as to its inclination to impose sanctions hardly deserves serious consideration. As Judge McGowan astutely spoke for a majority of the District of Columbia Circuit sitting *en banc*, "objections to documentation [supporting a claim for attorneys' fees under Title VII], like requests for evidentiary hearings, must be made to the District Court; one cannot, after receiving an unfavorable ruling from the trial judge, concoct objections for use on appeal." *Copeland v. Marshall*, 641 F.2d 880, 905 (D.C. Cir. 1980) (*en banc*).

Petitioners' assertion that the approach "approved" by the court of appeals here conflicts with the sanctions provisions and with other circuits is therefore legally and

factually wrong.[11] Due process considerations certainly inform the issue of sanctions for frivolous litigation; none of those considerations, however, was neglected in this case, as its particular facts reveal that petitioners received all of the due process to which they were entitled.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should in all respects be denied.

Respectfully submitted,

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11. The Fifth Circuit has held that a hearing on an award of attorneys' fees is required *if there are disputed issues of fact. King v. McCord*, 621 F.2d 205, 206 (5th Cir. 1980); *Cook v. Ochsner Foundation Hospital*, 559 F.2d 270 (5th Cir. 1977) (remand for hearing where affidavits created a conflict); *Matter of First Colonial Corp. of America*, 544 F.2d 1291, 1300 (5th Cir.), *cert. denied*, 431 U.S. 904 (1977). Petitioners raised no fact issues and the procedure required by those cases never came into play.